Supreme Court U.S.
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MICHAEL RODAK, JR., CLERK

No. 79-880

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HENRY KISSINGER, *et al.*,

*Petitioners,*

*v.*

MORTON HALPERIN, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

## MOTION OF
## BERTRAM ZWEIBON, MARILYN BETMAN, IRVING CALDERON, STUART C. COHEN, SHELDON DAVIS, JEROME EISENBERG, LAWRENCE H. FINE, EILEEN GARFINKLE, RUTH HARTSTEIN, LIBBY KAHANE, MEIR KAHANE, NEIL S. ROTHENBERG, MURRAY SCHNEIDER, ELI SCHWARTZ and ALEX STERNBERG, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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The plaintiffs in *Zweibon v. Mitchell,* 606 F.2d 1172 (D.C. Cir. 1979), petitions for writs of certiorari pending (Nos. 79-881, 79-883), move this Court, pursuant to Rule 36 of the Rules of the Supreme Court, for leave to file the accompanying twenty-page brief *amicus curiae* in support of respondents. Respondents' written consent is

attached hereto (Attachment #1). Although petitioners' consent was requested (Attachment #2), no written response was received. Petitioners have indicated verbally that they would not consent to the filing of the brief.

Movants seek to file this brief because this Court's opinion in *Kissinger v. Halperin* may encompass two issues which are of singular importance to the resolution of *Zweibon*. The first relates to the petitioners' argument that the decision of the Court of Appeals for the District of Columbia Circuit in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), should be given prospective effect only. The accompanying brief urges this Court to make clear, if it should decide to give *Zweibon* prospective effect, that the individuals whose litigation produced the decision in *Zweibon* are entitled to benefit from it. None of the parties to the instant litigation are likely to brief this issue.

The second issue relates to the petitioners' argument that the President and his immediate subordinates are entitled to absolute immunity or "qualified immunity as a matter of law." The accompanying brief urges this Court to hold a cabinet officer who is not acting at the specific direction of the President to the qualified immunity defense of *Butz v. Economou*, 438 U.S. 478 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974), under which he must establish both (1) that he actually believed his conduct to be lawful, and (2) that such a belief was reasonable. While the issue of the scope of immunity available to cabinet officers apart from that which might be derivative of presidential immunity is clearly presented by, and may be necessary to the disposition of, *Kissinger v. Halperin* (because a presidential subordinate would have available to him at least the immunity that he would have had had he acted alone),

independent, as opposed to derivative, immunity will not be the focus of the parties' briefs because that case involves individuals acting at the specific direction of the President.

For eight years, the plaintiffs in *Zweibon* have been seeking compensation for the violation of their rights in 1970 and 1971. The manner in which this Court decides the issues before it in *Halperin* will determine, in large part, whether they can proceed to a determination on the merits.[1] For these reasons, the plaintiffs in *Zweibon* move this Court for leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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*Attorney for Amici Curiae.*

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[1] *Amici* have been represented below and in this Court by Nathan Lewin, Martin D. Minsker and Jamie S. Gorelick, who have participated in the preparation of this brief. They are members of a law firm which also represents former President Richard Nixon in connection with civil litigation and other matters unrelated to the electronic surveillances at issue in *Halperin.* While the issues before the Court in *Halperin* affect interests of the former President in these other matters (and have been discussed, in that context, by other attorneys in the firm with attorneys for the Department of Justice), the arguments presented in this *amicus* brief do not relate to, and would not affect, those interests.

[2] Admitted to practice before the Supreme Court as of November 3, 1980.

ATTACHMENT #1

MARK H. LYNCH
Attorney at Law
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

October 28, 1980

Jamie S. Gorelick, Esquire
Miller, Cassidy, Larroca & Lewin
Suite 500
2555 M Street, N.W.
Washington, D.C. 20037

Re: *Kissinger v. Halperin*,
No. 79-880 (S. Ct.).

Dear Ms. Gorelick:

Respondents in the above-captioned case consent to the filing of a brief *amicus curiae* by the respondents in *Mitchell v. Zweibon*, No. 79-881 (S. Ct.).

Sincerely,

/s/ Mark H. Lynch
Mark H. Lynch

ML/skh

ATTACHMENT #2

ARONSTEIN AND ZWEIBON

Attorneys at Law
Eight West Fortieth Street · New York, N.Y. 10018
(212) 921-4730

Bertram Zweibon
Richard L. Aronstein

October 14, 1980

*BY HAND*

Mr. Wade H. McCree, Jr.
Solicitor General
United States Department of Justice
Tenth and Pennsylvania Avenue
Washington, D.C.

Re: *Kissinger v. Halperin, No. 79-880*

Dear Mr. McCree:

I am writing to request your consent to the filing of a brief *amicus curiae,* in support of respondents in the above-referenced case, by plaintiffs in *Zweibon v. Mitchell,* petitions for writ of certiorari pending, Nos. 79-881, 79-883. That case is being held pending the Court's decision in *Kissinger v. Halperin,* No. 79-880.

Two issues potentially raised by *Halperin,* but not likely to be the focus of the parties' briefs, are critical to the resolution of *Zweibon:* (1) whether the litigants whose action establishes a judicial ruling are entitled to the benefit of that ruling even if it is otherwise given prospective effect; and (2) whether an executive branch officer not acting in concert with or at the direction of

the President should be entitled only to a qualified immunity defense under which he would have to establish an actual and reasonable belief that his acts were lawful. I would like to file a brief *amicus curiae* which focuses on those issues. I request your consent to the filing of that brief.

I would appreciate a response by October 20, 1980.

Sincerely yours,

/s/ Bertram Zweibon
Bertram Zweibon

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